

APPEAL NO. 022668
FILED DECEMBER 4, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 23, 2002, with the record closing on September 26, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth, sixth, seventh, eighth, and ninth quarters and that the claimant permanently lost entitlement to SIBs at the end of the sixth quarter. The claimant appeals those determinations. There is no response from the respondent (self-insured) contained in our file. The letter received from the doctor, who is not a party, cannot be considered.

DECISION

We modify and affirm the hearing officer's decision in part and reverse and render in part.

First, the hearing officer did not err in determining that the claimant did not satisfy the good faith requirement in the qualifying period for the fifth and sixth quarters. The hearing officer was not persuaded that the evidence presented by the claimant was sufficient to satisfy the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)). We find no error in the hearing officer's determination that the claimant did not satisfy the requirement of conducting a good faith job search. The hearing officer was not satisfied that the claimant's efforts to look for work were undertaken in good faith in an attempt to gain real employment. Nothing in our review of the hearing officer's determination in that regard reveals that it is so against the great weight as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to disturb that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we affirm the determination that the claimant is not entitled to SIBs for the fifth and sixth quarters.

We note that the hearing officer commented that he was "*sua sponte*" taking official notice of the Dispute Resolution Information System (DRIS) entries for this claim. The hearing officer concludes from review of the DRIS notes that there was an earlier determination that the claimant was not entitled to SIBs for the third and fourth quarters. The hearing officer determined that because the claimant had lost the third and fourth quarters previously and the claimant did not prove entitlement to SIBs for the fifth and sixth quarters in the case before him, the claimant had permanently lost entitlement to SIBs.¹

¹ Rule 130.106 (and we note Section 408.146(c) as well) provides that a claimant who is not entitled to SIBs for the period of four consecutive quarters permanently loses entitlement to SIBs. Pursuant to that rule the hearing officer concluded that the claimant "has permanently lost entitlement to [SIBs]."

We caution hearing officers from adding issues on their own motion after the hearing and without prompting from either of the parties. See Texas Workers' Compensation Commission Appeal No. 92350, decided September 8, 1992. Simply adding an issue after the hearing and not allowing the parties to develop the evidence is fraught with pitfalls. For example, before a claimant permanently loses entitlement to SIBs, Rule 130.106 has certain prerequisites that must be adhered to by the carrier (or self-insured), or the claimant does not lose permanent entitlement to SIBs. Furthermore, although the hearing officer took official notice of the Commission files, there was no evidence whether the third or fourth quarters had been appealed to district court or beyond or whether such decisions were final or perhaps even resolved in some other manner, which would clearly affect whether there was a permanent loss of entitlement. Whether the claimant has permanently lost entitlement to SIBs was not an issue before the hearing officer that the parties had a chance to develop and argue. We decline to consider it subsumed as an issue in which multiple quarters of SIBs are contested. Consequently, we strike those determinations that deal with the permanent loss of entitlement to SIBs and accordingly modify the decision and order by striking all such language from the decision and order. See Texas Workers' Compensation Commission Appeal No. 010409, decided March 29, 2001.

The hearing officer further determined that the claimant was enrolled in and was satisfactorily participating in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying periods for the seventh, eighth, and ninth quarters. As we said in Texas Workers' Compensation Commission Appeal No. 001536, decided August 9, 2000, the claimant's enrollment and satisfactory participation in the vocational rehabilitation program in this matter satisfied the definition of "good faith" set forth in Rule 130.102(d)(2) and a claimant need not satisfy Rule 130.102(e) if such claimant has satisfied one of the good faith elements in Rule 130.102(d), citing Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000. However, as we previously stated, *supra*, the hearing officer erred in determining that because the claimant had permanently lost entitlement to SIBs at the end of the sixth quarter, the claimant was not entitled to SIBs for the seventh, eighth, and ninth quarters. Consequently, we reverse those determinations and render a new decision and order that the claimant is entitled to SIBs for the seventh, eighth and ninth quarters.

In summary, we affirm the hearing officer's determinations that the claimant is not entitled to SIBs for the fifth and sixth quarters, we modify and strike the hearing officer's determination that the claimant permanently lost entitlement to SIBs after the sixth quarter and we reverse the hearing officer's decision and order that the claimant is not entitled to SIBs for the seventh, eighth, and ninth quarters and render a new decision that the claimant is entitled to SIBs for the seventh, eighth, and ninth quarters.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**SA
(ADDRESS)
(CITY) TEXAS (ZIP CODE).**

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge